Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

ANTHONY F. LEPARDO,
D/B/A AFL Disposal Co., Inc.,
Petitioners,

v.

BOARD OF HEALTH AND HOSPITALS OF THE CITY OF BOSTON; LEWIS POLLACK, INDIVIDUALLY AND AS HE IS COMMISSIONER OF THE CITY OF BOSTON, DEPARTMENT OF HEALTH AND HOSPITALS; RONALD JONES, INDIVIDUALLY AND AS HE IS DIRECTOR OF THE OFFICE OF ENVIRONMENTAL AFFAIRS OF THE DEPARTMENT OF HEALTH AND HOSPITALS; JOHN SHEA, INDIVIDUALLY AND AS HE IS PRINCIPAL HEALTH INSPECTOR FOR THE OFFICE OF ENVIRONMENTAL AFFAIRS; AND AL SILVIA, INDIVIDUALLY AND AS HE IS AN INSPECTOR WITH THE DEPARTMENT OF HEALTH AND HOSPITALS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

PETITION FOR A WRIT OF CERTIORARI.

RICHARD J. VITA, P.C.
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August, 1994

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Questions Presented for Review

1. Did the City of Boston's later disavowal of a permit issued to locate a transfer station on property constitute a taking of property without due process of law or just compensation where the only evidence was that operation of a transfer station had been and was the only reasonable use of the land and where the permit was disavowed because the official who approved and issued the permit allegedly lacked the actual authority to issue it?

2. Did the granting of summary judgment deprive the property owner of his right to due process of law where the courts below refused as a matter of law to recognize the property owner's claims of apparent authority, estoppel or detrimental reliance against the city in spite of uncontradicted evidence that the official who issued the permit had issued such permits for years and reasonably believed that he had the authority to do so and that the property owner had acted in reliance on the official's apparent authority to issue the permit?

Opinions Below

On May 25, 1994 the Massachusetts Supreme Judicial Court denied further appellate review of an April 14, 1994 unreported memorandum of the Massachusetts Appeals Court affirming the unreported summary judgments of the Suffolk Superior Court. Lepardo v. Board of Health and Hospitals, 36 Mass.App.Ct. 1114, further appellate review denied, 418 Mass. 1102 (1994).

Jurisdiction of the Supreme Court

Under 28 U.S.C., § 1257, the Supreme Court of the United States has jurisdiction to review the April 14, 1994 memorandum of the Massachusetts Appeals Court which the Massachusetts Supreme Judicial Court declined to review on May 25, 1994.

Constitutional Provisions

"No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amendment V.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." United States Constitution, Amendment XIV.

Statement of the Case

When Anthony Lepardo purchased property in Boston, Massachusetts in 1982, it had been used as a refuse transfer station, a place where refuse is collected temporarily before it is

taken elsewhere, since 1966. He intended that AFL Disposal Co., Inc. would operate the transfer station under ownership of Mr. Lepardo and his sons.[1]

After a public hearing, the Boston Zoning Board of Appeals issued a variance permitting the continued use of the property as a refuse transfer station. The Board found that "this particular parcel of land is, and has historically been, suited for use as a transfer station...," the property owner "would have to perform extensive excavation and demolition of existing structure to use this parcel for any other purpose," and "due to the peculiar conditions of the parcel and the structure thereon ... application of the provisions of the Zoning Code with respect to operation of a transfer station at this site would deprive [the property owner] of the reasonable use of his land."

After another public hearing, an official with the Boston Department of Health and Hospitals who had been issuing such site assignments for years but who was then assigned to the Environmental Section of Inspectional Services, approved the location of a refuse transfer facility at the property. After the property owner paid the City the required fees, a permit was issued. The approval and permit were signed by the Director of Environmental Health Services.

Thereafter, the property owner paid fees to the City to renew the permit. In reliance on the permit, the property owner spent more than $300,000 on improvements to and equipment for the transfer facility.

The Boston Department of Health and Hospitals later notified the property owner that it was their position "that no valid site assignment for the operation of a solid waste transfer station at [the property] presently exists" because the official

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[1] AFL Disposal Co., Inc. has no parent or subsidiary company to be listed under Supreme Court Rule 29.1.

who had approved and signed the permit had not been actually authorized to issue the permit.

On December 23, 1983 the Boston Board of Health and Hospitals filed a complaint in the Boston Housing Court against the property owner, seeking and obtaining an injunction against the operation of a transfer station at the property. That injunction is still in effect.

On May 15, 1984 the property owner filed a verified complaint and claim of jury trial in Suffolk Superior Court against the Boston Board of Health and Hospitals and others seeking declaratory and injunctive relief as well as damages. The property owner complained that the official who issued the permit had actual or apparent authority to do so, that he had relied to his detriment on the issuance of the permit, and that the disavowal of the permit constituted a taking of his property without due process of law and without just compensation in violation of the United States Constitution.

The two law suits were consolidated. On May 25, 1985 the Boston Housing Court granted partial summary judgment against the property owner's claims of apparent authority, estoppel and detrimental reliance. Even though the evidence was uncontradicted that the official who issued the permit had been issuing such permits for years and reasonably believed that he had the authority to do so and that the property owner had acted in reliance on the official's apparent authority to issue the permit by paying the required fees for the permit and its renewals and by incurring expenses to improve the property, judgment entered because, as a matter of law, estoppel could not bind the city.

On May 24, 1989 the Suffolk Superior Court, relying upon this Court's decision in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987), granted partial summary judgment against the property owner's taking claims. Even

though there was no evidence that the city had been motivated by health and welfare concerns or that the property could be put to another use, and even though the only evidence was that the property was unsuitable for any other use, judgment entered based upon findings that the city was acting to protect health and welfare and had left the property owner with a "full 'bundle' of property rights."

These judgments were affirmed by the Massachusetts Appeals Court on April 14, 1994. The Massachusetts Supreme Judicial Court denied a timely request for discretionary further appellate review on May 25, 1994.

Argument

The decision below conflicts with decisions of this Court which have required compensation is such cases and which have required an opportunity to litigate facts as a component of due process.

In decisions from Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) to Lucas v. South Carolina Coastal Council, ___ U.S. ___, ___, 112 S.Ct. 2886, 2899 (1992) and Dolan v. City of Tigard, ___ U.S. ___, ___, 114 S.Ct. 2309, 2322 (1994), this Court has recognized that, since there are situations where regulation may go too far, constitutional limits must be placed upon the noncompensable exercise of police power. One situation where this Court has consistently required that a property owner be compensated, regardless of any public interest supporting the exercise of police power, is typified by Mahon and Lucas where the property owner has been deprived of all economically beneficial or productive use of his land. See also, e.g., Agins v. City of City of Tiburon, 447 U.S. 255, 260 (1980). In cases such as United States v. Causby, 328 U.S. 256, 262 (1946), this Court has recognized a

compensable taking where the utility of land has been limited and its value diminished.

Here, the city's later disavowal of the permit which had recognized the long-existing use of the property and the rejection of the owner's takings claims by the court below represent a facial taking of property without due process and without just compensation because the owner has been deprived of the only reasonable use of his land. There is and was no evidence that the property could be put to any other use.

Indeed, rather than applying facial taking jurisprudence, the court below did precisely the opposite. By summarily rejecting the owner's claims of apparent authority, estoppel and detrimental reliance, the court below effectively established an irrebuttable presumption that no taking could have occurred. This deprived the property owner of due process of law. Concrete Pipe & Prod. v. Const. Laborers Pen. Tr., ___ U.S. ___, ___, 113 S.Ct. 2264, 2279-2283 (1993) [to avoid violating due process, statute must be construed so as not to foreclose factual inquiries].

The opinion in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987), upon which the decision below rested, no longer represents the view of the majority of the Court. See, id, 480 U.S. at 506 [Rehnquist, C.J., with whom Powell, O'Connor, and Scalia, J.J. join dissenting]; Lucas, ___ U.S. at ___ n. 7, 112 S.Ct. at 2894 n. 7 [recognizing that Keystone was "inconsistent" with Mahon. Insofar as the decision below rested upon the power to regulate "noxious uses," Lucas, ___ U.S. at ___, 112 S.Ct. at 2899 held that "the 'noxious use' logic cannot serve as a touchstone to distinguish regulatory 'takings'-- which require compensation -- from regulatory deprivations which do not require compensation."

The decisions of this Court in cases such as Mahon and Lucas plainly mandate compensation for the taking which has

occurred here. Concrete Pipe demonstrates the constitutional flaw in foreclosing inquiry into issues such as apparent authority, estoppel and detrimental reliance. To the extent that the decision below may have rested upon the Keystone majority, that reliance was misplaced in light of Lucas.

This Court should issue a writ of certiorari to the Massachusetts Supreme Judicial Court and reverse.

Respectfully submitted,
Anthony F. Lepardo
d/b/a AFL Disposal Co., Inc.,
Petitioners

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August, 1994

Appendix

Massachusetts Supreme Judicial Court order
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Massachusetts Appeals Court memorandum
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Suffolk Superior Court memorandum
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Boston Housing Court memorandum
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Supreme Judicial Court
for the Commonwealth of Massachusetts
1412 Courthouse. Boston, Massachusetts 02108
(617) 557-1020

Richard J. Vita, Esquire
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Boston MA 02109

RE: Docket No. FAR-07244

ANTHONY P. LEPARDO & another

v.

BOARD OF HEALTH & HOSPITAL8 OF BOSTON & others.

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on May 25, 1994, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated, May 25, 1994

To: Richard J. Vita, Esquire
John T. Walsh, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

92-P-1424

ANTHONY P. LEPARDO & another[1]

v.

BOARD OF HEALTH & HOSPITAL OF BOSTON & others[2]

MEMORANDUM AND ORDER UNDER RULE 1:28

This ten year old case presents an unduly tangled procedural trail and a nearly unintelligible factual scenario.

In 1976, the commissioner of the department of health and hospitals for the city of Boston ("department") delegated his authority to assign locations for various refuse disposal and transfer stations and to hold public hearings under G.L.c. 111, § 150A, to Lewis W. Pollack, then deputy !commissioner for community health. (A. 68, 116} Deputy Commissioner Pollack in turn delegated his authority to Anthony Cataldo, director of

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[1] AFL Disposal Co., Inc.

[2] The commissioner of health and hospitals of Boston, director of the office of environmental affairs of Boston, and two inspectors.

the department's environmental health inspectional services.[3] (A. 68-69 132-133)

In October, 1976, by ordinance, the Boston City Council banned the operation, establishment or maintenance of any refuse treatment or disposal facility in the city (A. 121), as a result of which, in the fall of 1979, Deputy Commissioner Pollack decided that the department would cease processing applications for site assignments under c. 111, § 150A[4] (A. 69)

By letter dated December 30, 1981, from David Rosenbloom, then commissioner of the department, to Anthony Pepicelli, acting commissioner of inspectional services (A. 197), Rosenbloom stated that the board of health and hospitals of the city of Boston (board) voted to authorize and direct the transfer of employees from the department's division of inspectional services to the city of Boston's inspectional services department and to delegate to it "the power, on behalf of and under the authority of this board, to conduct enforcement activities under any statute, ordinance or regulation heretofore directly enforced or adopted by this [b]oard" (emphasis supplied). The letter also stated that "[t]he [b]oard expressly reserves to itself the power to: conduct hearings pursuant to statute, ordinance

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[3] By affidavit in 1985, Pollack, then commissioner of health and hospitals, averred below that, as deputy commissioner, he "delegated limited authority to ... [Cataldo] reserving to myself the ultimate authority to issue or deny such assignments." (A. 68-69) The plaintiffs and Cataldo agreed that Pollack signed the site assignments. (A. 136, 154-155)

[4] By affidavit, Deputy Commissioner Pollack averred below that "[p]ursuant to that decision, Mr. Cataldo ceased to have any authority to hold hearings on applications for site assignments under [§] 150A." (A. 69)

or regulation the authority for which has not previously been delegated to an officer of the [d]epartment hereby transferred" and concludes "[t]his delegation is effective until withdrawn by this [b]oard." (A. 197, 198) Pursuant to the board's authorization, Cataldo was one of the employees transferred to the inspectional services department and authorized to conduct enforcement activities.[5]

On February 4, 1982, plaintiff Lepardo purchased the property located at 157-171 Hampden Street in Boston for use as a household refuse transfer facility. The property had been used as a refuse transfer facility since approximately 1966. (A. 248)

In June, 1982, the department, through the board, voted to resume the processing of applications for site assignments under c. 111, § 150A. (A. 123) Deputy Commissioner Pollack delegated authority to conduct hearings on such applications to a panel which included Cataldo, but Pollack expressly reserved to himself the authority to issue or deny the site assignments. (A. 70) Thereafter, Cataldo processed plaintiff Lepardo's application for a site assignment, held a hearing and, with the express approval of his superior, Pepicelli,

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[5] Commissioner Pollack averred below that "[s]ince I had rescinded Mr. Cataldo's authority to conduct hearings under [§] 150A in the fall of 1979, Mr. Cataldo did not take with him the authority to conduct hearings under [§] 150A. I retained that authority in addition to my authority to issue or deny site assignments when Mr. Cataldo was transferred to the [i]nspectional [s]ervices [d]epartment of the [c]ity." (A. 69) On deposition, Cataldo testified that he was never informed of any decision rescinding his authority to conduct hearings under § 150A or to issue site assignments. (A. 134-136)

the commissioner of inspectional services (A. 155-157), issued Lepardo the site assignment on November 1, 1982. (A. 142-145, 147-148, 155-157, 162-163)

Thereafter, city officials decided that Cataldo lacked authority to issue the site assignment. By action commenced in the Housing Court in December, 1983, the city sought to enjoin Lepardo from operating or maintaining a transfer station. (A. 7, 83-91) On May 15, 1984, Lepardo commenced this Superior Court action (A. 1, 18-29), alleging (as is here material) violations of due process and an unconstitutional taking, and seeking a declaration that the site assignment was valid.[6]

By order of assignment dated August 22, 1984, the Chief Administrative Justice assigned a judge of the Housing Court to sit in the Superior Court department for the sole purpose of hearing the Superior Court action (A. 1, 41, 42), and the two cases apparently were treated as having been consolidated.

On January 18, 1984, the city moved for partial summary judgment on counts I and II of the Superior Court complaint. (A. 2, 43) By order dated May 29, 1985, a Housing Court judge specially assigned to hear the Superior Court action[7] (A.

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[6] For ease of reference, we shall refer to Lepardo as the plaintiff and to the collective defendants as the city.

[7] This matter was consolidated with a Housing Court action in which the judge reported to this court the issue of whether the Housing Court had jurisdiction. (A. 231-233) We held that the Housing Court lacked jurisdiction, vacated the Housing Court judgment and remanded the case for dismissal of the Housing Court action. Our decision in that case, however, did not affect the Superior Court judgment, and does not bear on the result we now reach.

1, 41, 42) concluded that the board was not estopped to deny Cataldo's authority to issue the site assignment. (A. 227) The judge also concluded, however, that he had to remand the case to the board, the rightful authority, as it had never issued an assignment and thus Lepardo had nothing from which to appeal. (A. 227-228) The judge allowed the city's motion for partial summary judgment, "provided [the city] permits a hearing before the [b]oard of [h]ealth within thirty (30) days to consider the merits of the application." (A. 228-229) Partial summary judgment entered on July 31, 1985.[8] (A. 230)

Despite the ruling that he be given an expedited hearing on a site assignment, Lepardo did not seek a new hearing. This case then languished for over two years until February 3, 1987, when the same judge allowed Lepardo's motion for reassignment and/or transfer to the Superior Court. (A. 2}[9] By memorandum

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[8] Normally, such an order of remand is interlocutory and not appealable as a matter of right, but here, where there was no hearing, and because of the age of this matter (now going on ten years) and because the parties have fully briefed and argued the case on the merits, we decide the issues presented. See Medi-Cab of Mass. Bay, Inc. v. Rate Setting Commn., 401 Mass. 357, 358 n.2 (1987); Lovaco, Inc. v. Zoning Bd. of Appeals of Attleboro, 23 Mass. App. Ct. 239, 244 (1986).

[9] As the judge had been assigned to sit in the Superior Court for this matter, this transfer was unnecessary. However, either through clerical or judicial oversight, the judgment in the Superior Court action had not been entered on the Superior Court docket. That omission does not affect the validity of the partial summary judgment in the Superior Court case.

and order dated November 12, 1987 (A. 3, 238-242), a second judge ruled that our decision in the Housing Court action did not vacate the first judge's entry of partial summary judgment in the Superior Court action. The second judge also ordered that the Superior Court judgment be entered on the Superior Court docket, and further ruled that that judgment barred relitigation of the validity of the site assignment. The case then proceeded to final judgment and Lepardo appealed.[10]

1. Propriety of partial summary judqment.

The plaintiffs assert that there were genuine issues of material fact present as to the apparent authority of Cataldo to issue the site assignment, that the city was estopped to deny the validity of the site assignment, and thus that the first judge erred by allowing the defendant's motion for partial summary judgment. While this argument is not without some force, we nonetheless conclude that the first judge properly ruled that the site assignment issued to Lepardo was invalid as matter of law.

We find compelling the first judge's ruling that Cataldo never had the power to issue a site assignment. By his transfer to the Inspectional Services department, and the limited transfer

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[10] On count II, the second judge ruled that the site was not protected by a grandfather clause in c. 111, § 150A, and that there was no unconstitutional taking of Lepardo's property. (A. 247-252) As best as we can discern from a record which lacks a copy of the amended complaint, the instant appeal concerns only the issues raised in counts I and II of that complaint. The parties stipulated to dismissal of count III below. (A. 253) A jury returned a verdict for the city on count IV, as amended, and the parties stipulated to !dismissal of civil rights claims as set out in that count. {A. 254-255)

to that department of authority for enforcement purposes only, the board expressly reserved the sole authority to issue site assignments. On that premise, the site assignment issued by Cataldo exceeded his authority and was invalid, and thus Lepardo was required to refile his application with the board. Coupled with the judge's reasoned decision to afford the city the opportunity to review Lepardo's application in an expedited hearing, we discern no error.[11]

Finally, we agree with the judge's ruling that the city was not estopped to deny the validity of the site assignment where the board, the entity charged with determining eligibility for site approvals and issuance thereof, had not made any such determination. See Murphy v. Dover, 35 Mass. App. Ct. 904, 905 (1993). See also Building Inspector of Wayland v. Ellen M. Gilford Sheltering Home Corp., 344 Mass. 281, 286 (1962). Generally, estoppel is not applied against the government in *connection* with its exercise of public duties, particularly when the government is acting in the public interest and safety, and where to do so would serve to frustrate the protection of that interest. See Risk Mgmt. Foundation of the Harvard Med. Insts., Inc. v. Commissioner of Ins., 407 Mass. 498, 509-510 (1990); Highland Tap of Boston, Inc. v. Commissioner of Consumer Affairs & Lic. of Boston, 33 Mass. App. Ct, 559,

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[11] In ruling as he did, the judge stated that "[i]t is not apparent to this Court that the [b]oard of [h]ealth will not fairly and in good faith consider Mr. Lepardo's application. If the [b]oard fails to act in good faith, then at that point in time, liability can be imposed upon the individual members. The Court has not a scintilla of evidence before it to suggest that the [b]oard has not or will not afford Mr. Lepardo an independent judgment in good faith to which he is entitled." (A. 228)

568-569 (1992); Municipal Liqht Co.of Ashburnham v. Commonwealth, 34 Mass. App. Ct. 162, 167 (1993).

2. Entry of partial summary judqment on the Superior Court docket.

We find no merit in the argument that the second judge erred by ordering that the first judge's order of partial summary judgment in the Superior Court action be entered on the Superior Court docket. [12] The first judge had been assigned to sit in the Superior Court and, as such, allowed the city's motion for partial summary judgment in that action. Although one judge may undo (albeit hesitantly) the work of another judge, the latter ijudge, as here, would be under rio duty to permit Lepardo to relitigate the issues so decided. See Peterson v. Hopson, 306 Mass. 597, 601, 603 (1940}; Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 622 (1989). As the second judge noted (A. 239-240), this court's order vacating the judgment in the consolidated Housing Court action did not affect the validity of the Superior Court judgment. See n. 7, supra.

3. Other issues. For the reasons stated by the second judge in his memorandum of decision on count II of the amended complaint, we find no merit in Lepardo's argument that his

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[12] It seems that the Superior Court judge treated the issue presented as being one of res judicata (i.e iissue preclusion), but this is a mischaracterization. As the entry of partial summary judgment occurred in this same Superior Court action, there is no judgment iin another original action which could have preclusive effect. If anything, the effect of the Housing Court judge's ruling should more properly be characterized as ithe law of the case. In their briefs to this court, the parties do not exhibit an awareness of the difference.

property should be "grandfathered" so as to receive a site assignment (A. 249-250). We also agree with the judge's determination that the city's actions did not effect a taking of Lepardo's property without just compensation. See Mile Road Corp. v. Boston, 345 Mass. 379, 383 (1963). See also Chief of the Fire Dept. of Boston v. Sutherland Apartments, Inc., 346 Mass. 685, 689 (1964); Rosenfeld v. Board of Health of Chillmark, 27 Mass. App. Ct. 621, 628 (1989).

Judgment Affirmed
By the Court
(Brown, Dreben & Fine, JJ.)

Entered: April 14, 1994

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 68679

ANTHONY F. LEPARDO, d/b/a AFL DISPOSAL CO., INC. & another[1]

VS.

BOARD OF HEALTH AND HOSPITALS
FOR THE CITY OF BOSTON & others[2]

MEMORANDUM OF DECISION AND ORDER ON COUNT II OF THE COMPLAINT

I. BACKGROUND

Count II of the complaint seeks a judgment declaring that under G.L. c. 111, § 150A, the plaintiffs were not required to obtain a site assignment from the Board of Health

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[1] AFL Disposal Co., Inc.

[2] Lewis Pollack, Individually and as Commissioner of the City of Boston, Department of Health and Hospitals; Ronald Jones, Individually and as Director of the Office of Environmental Affairs of the Department of Health and Hospitals; John Shea, Individually and as Principal Health Inspector for the Office of Environmental Affairs; and Ai Silvia, Individually and as an Inspector with the Department of Health and Hospitals.

and Hospitals for the City of Boston (Board of Health) to maintain and operate a refuse transfer facility at 157-171 Hampden Street, Roxbury, Massachusetts. The plaintiffs also are seeking consequential damages for the Board of Health's failure to recognize the allegedly valid site assignment, and a permanent injunction enjoining the defendants from interfering with the plaintiffs' right to operate a refuse transfer facility on their property.

The facts as stipulated in the "Agreed Statement of Facts as to Count II of the Complaint" are as follows. On February 4, 1982, plaintiff Anthony F. Lepardopurchasedtheproperty located at 157171 Hampden Street to use as a household refuse transfer facility. The property had been used as a refuse transfer facility since approximately 1966.

In late 1982, Lepardo applied for and was granted a site assignment as required by G.L. c. 111, § 150A from Anthony H. Cataldo, Director of the Environmental Health Division of the Inspectional Services Department, in return for five hundred dollars ($500.00). Subsequently, Lepardo was notified by Ronald Jones,[3] David Spackman[4], and John

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[3] Ronald Jones is the Director of the Office of Environmental Affairs of the Department of Health and Hospitals. On April 15, 1983, Jones notified Lepardo that there were technical deficiencies in Lepardo's site assignment.

[4] David Spackman is Special Corporation Counsel for the Department of Health and Hospitals. On September 8, 1983, he notified Lepardo that the site was not validly assigned. He explained that Cataldo lacked the authority to grant a site assignment.

Shea[5] that the site had not been validly assigned because Cataldo lacked the authority to issue the permit.

The plaintiffs now contend that they were never required by G.L.c. 111, § 150A to obtain a site assignment from the Board of Health because the property has continually been used as a refuse transfer facility for the past twenty years and as such, the preexisting facilities should be "grandfathered".

II. DISCUSSION

When the plaintiffs first acquired the property, G.L.c. 111, 150A provided that "no place in any city or town shall be established or maintained ... as a site for a facility, unless such place has ... been assigned by the board of health of such city or town." G.L.c. 111, § 150A (as inserted by 1955, c. 310, and as amended through St. 1978, c. 197, § 4). The refuse transfer facility which the plaintiffs intended to maintain and operate on their property is included within the definition of "facility" as used within section 150A. Therefore, the plaintiffs were required to obtain a valid site assignment before operating or maintaining the existing refuse transfer facility.

The plaintiffs maintain that the property should have been deemed to have automatic site assignment because the property had been used as a refuse transfer facility for twenty years. It is the plaintiffs' assertion that it was not necessary to apply for a site assignment.

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[5] John Shea is the Principal Health Inspector for the Office of Environmental Affairs of the Department of Health and Hospitals. On March 12, 1984, he notified Lepardo that his request for a renewal permit would not be processed since the site had never been validly assigned.

In 1955, when the statute was first enacted, section 150A included a "grandfather clause" providing that "[a]ny place in use as ... a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator on the effective date of this act shall be deemed to have been assigned under section [150A]." G.L.c. 111, § 150A (original version). However, the original version of section 150A was inapplicable to refuse transfer facilities, encompassing only sites used as "a dumping ground for garbage, rubbish, or other refuse, or ... for a refuse disposal incinerator." G.L. c. 111, § 150A (original version). Moreover, the plaintiffs' land was not used as a refuse transfer facility in 1955, and the grandfather clause would be inapplicable regardless of whether § 150A appliedto refuse transfer facilities.

In 1970, section 150A was amended to cover refuse transfer facilities. Simultaneously, the grandfather clause was deleted. Thus, after the 1970 amendment, anyone operating a refuse transfer facility was required to obtain a site assignment from the Board of Health. No exception was made for pre-existing facilities. However, the then-owner of the property never obtained a valid site assignment. Therefore, in 1982 when the plaintiff acquired the property, any operation of a refuse transfer facility without a site assignment would have been in violation of section 150A. Contrary to the plaintiffs' assertions, the property is not "grandfathered" and in the absence of a valid site assignment it cannot be operated or maintained as a refuse transfer facility.

The plaintiffs argue that if this court fails to read a grandfather rule into section 150A, as amended by St. 1970, c. 839, the statute constitutes an unfair taking without compensation. However, the right to use property as a refuse transfer facility is not a right immune from governmental action. See Mile Road Corp.v. Boston, 345 Mass. 379, 384

(1963). It has long been held that the Commonwealth has the power to interfere with property rights in order to effect a reasonable protection of the public safety without compensating landowners. Chief of the Fire Department of Boston v. Sutherland Apartments, Inc., 346 Mass. 685, 689 (1964).

In evaluating whether a particular statute effects a taking, it is necessary to consider whether legitimate state interests are advanced by the statute and whether property owners are deprived of economically viable use of the land. Agis v. Tiburon, 447 U.S. 255, 260 (1980). Here, the character of the governmental action of protecting public health and welfare by controlling dumping grounds and refuse transfer sites weighs heavily against finding a taking. See Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 485 (1987). In Keystone, the Supreme Court stated that:

> prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or appropriate of property ... The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not - and consistently with the existence and safety of organized society, cannot be - burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted by a noxious use of their property, to inflict injury upon the community.

Keystone, supra at 489 (quoting Mugler v. Kansas, 123 U.S. 623, 668-669 (1887)(upholding law prohibiting manufacturing and sale of intoxicating liquors).

Although there may be a diminution of the value of the plaintiffs' property, the full value is not taken. Viewing the property in the aggregate, the plaintiffs are still left with a full "bundle" of property rights. Moreover, G.L. c. 111, § 150 mandated proper site assignment before operating a refuse transfer facility twelve years prior to plaintiffs' acquisition of the property and, therefore, left the plaintiffs with no false investment expectations. Therefore, I find that there is no unconstitutional taking of the plaintiffs' property.

ORDER

For all the foregoing reasons, it is hereby ORDERED that entry be made DECLARING that:

1. A site assignment granted by the Board of Health and Hospital for the City of Boston is required to operate and maintain a refuse transfer facility on the premises at 157-171 Hampden Street in the Roxbury District of Boston.

John L. Murphy, Jr.
Justice of the Superior Court

Dated: May 24, 1989

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, s s: HOUSING COURT DEPARTMENT

CITY OF BOSTON DIVISION
CIVIL ACTION
NO./1/6/3/3/3/

JOHN SHEA, Principal Health Inspector
CITY OF BOSTON, ET AL

VS.

ANTHONY LEPARDO, individually and as
President and owner of AFL DISPOSAL CO., ET AL

ORDER

In looking at the complaint of Mr. Lepardo, the Court has come to the conclusion that the Board of Health and Hospitals is not estopped to deny Mr. Cataldo's authority to issue a site assignment. "It is well settled that one dealing with officers of a municipality must at his peril ascertain their powers, and that the municipality is, in general, not bound to estoppel to unauthorized liabilities." Elbe File & Binder Co., Inc. v. Fall River, 329 Mass. 682, 686 (1953). The complaint brought by Anthony F. Lepardo does not fall within one of the exceptions to the rule. Furthermore, the complaint, although it asks for damages does not set forth a recognizable claim upon which a Court could order that award.

Pursuant to G.L.ch. 111, Sec. 150A this Court must remand the case back to the Board of Health and Hospitals for the City of Boston. The Board has never issued an assignment,

therefore there is nothing to appeal from. This Court wants a decision by the Board on the merits as to whether a site assignment should issue. This Court, on this record, is not going to supplant the expertise of the Board whenthe Board has never had the opporutnity, on the merits, to review the application. It is not apparent to this Court that the Board of Health will not fairly and in good faith consider Mr. Lepardo's application. If the Board fails to act in good faith, then at that point in time, liability can be imposed upon the individual members. The Court has not a scintilla of evidence before it to suggest that the Board has not or will not afford Mr. Lepardo an independent judgment in good faith to which he is entitled. See Castelii v. Board of Selectman of Seekonk,15 Mass. App. Ct. 711, 714, 715 (1983).

Under G.L.ch. 111, Sec. 150A, Mr. Lepardo has certain substantial rights if the Board of Health rescinds, suspends or modifies an assignment. But where there has been no valid assignment, there is no right to grieve to the Courts. Unfortunately for Mr. Lepardo, detrimental reliance is not a defense to this action under these facts for, "the inspector sues in the interest of the town and it is not estopped." Building Inspector of Wayland, v. Ellen M. Grifford Sheltering Home Corp., 344 Mass. 281 (1962). The Supreme Judicial Court has determined that the Building Commission has the implicit authority to revoke any illegal permit and this determination will extend to the Board of Health. The motion of the City of Boston for partial summary judgment is allowed provided it permits a hearing before the Board of Health within thirty (30) days to consider the merits of the application. The Court is concerned with the legitimacy and viability of Mr. Lepardo's business - it would be quixotic for Mr. Lepardo to obtain a permit, when he would or could no longer be able to use it.

E. GEORGE DAHER
CHIEF JUSTICE

Date: May 29, 1985

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